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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 706

BRASS AND COPPER WORKERS FEDERAL LABOR UNION NO. 19,322, AFL-CIO,
Petitioner,

vs.

AMERICAN BRASS COMPANY, KENOSHA DIVISION, a Subsidiary of ANACONDA COPPER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled action on December 22, 1959.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is reported at . . . Fed. 2d . . ., and is attached to this petition as Appendix "A," *infra* pages 10-20. The opinion of the United States District Court is reported at 172 F. Supp. 465 and is printed as Appendix "B," *infra* pages 21-32.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 22, 1959. The jurisdiction of this court is invoked under Section 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether it is the function of the federal court, in an action to compel arbitration under Section 301 (a) of the Labor Management Relations Act, to resolve a dispute concerning the interpretation and application of the terms of the grievance procedure under a contract which authorizes arbitration of "any" dispute involving the "interpretation" or "application" of "any" part of the agreement.

STATUTORY PROVISIONS INVOLVED.

The pertinent language of Section 301 of the National Labor Relations Act, 29 U. S. C. A., § 185, is as follows:

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

This action was commenced by the Brass and Copper Workers Federal Labor Union, No. 19322, AFL-CIO, hereinafter called the Union, to compel arbitration of a grievance processed pursuant to the terms of a collective bargaining agreement.

The Respondent is a manufacturer of brass and copper products located in Kenosha, Wisconsin, whose employees are represented by the Union (R. 10).[1]

The collective bargaining agreement under which the grievances involved in this case were filed provides that the company's action in "making discharges for cause" are subject to review "in arbitration" (Sec. 3, R. 20). A separate pension agreement, to which the Company and the Union are parties, provides for the termination of the employee's service following his 68th birthday unless written permission to continue service beyond that date is obtained from the company (R. 18).

On January 1, 1955, the Company compulsorily retired all employees within the bargaining unit who were 68 years of age or over and who were entitled by length of service to receive their pension (para. 7, R. 11). Thereafter, on April 1, 1955, the Company compulsorily retired all employees in the bargaining unit who were then 69 years of age or over, even though such employees were not eligible to receive pension benefits under the agreement because of insufficient service with the company (para. 7, R. 11).

On April 4, 1955, the parties held a grievance meeting in which the Union protested the compulsory retirement of the non-pensioners, claiming that such retirements constituted discharges without "cause" contrary to the provisions of the collective bargaining agreement. At this meeting the Union demanded that the non-pensioners be reinstated and reimbursed for any loss they may have suffered by reason of the premature compulsory retirement [para. 7 (c), R. 11]. The Company declined to reinstate the em-

[1] The facts were stipulated in writing by the parties. The entire stipulation appears on pages 10-17 of the Certified Record, with the attached exhibits appearing on pages 17-22. References in this Petition (R. . . .) are to the Certified Record. References to the appendix to this Petition are designated (App. p. . . .)

ployees or to reimburse the employees for their loss [para. 7 (c), R. 11].

On the same day, April 4, 1955, the Union wrote a letter to the Company in which it repeated its protest of the discharge of these employees and requested reinstatements with all rights and reimbursement of loss of pay [para. 7 (c), R. 11]. No written reply was ever received to this letter (R. 12).

On April 12, 1955, the Union requested the Company to join with the Union in submitting the grievance to the Federal Mediation and Conciliation Service "for disposal" [para. 7 (d), R. 13]. The Company, in the *only* communication in writing made to the Union in this case, declined to join in that request [para. 7 (e), R. 14].

The Union did not, within 10 days after the receipt of this letter, request that the dispute be submitted to arbitration [para. (f), R. 14]. However, the Union unilaterally requested the Federal Mediation and Conciliation Service to intervene in the dispute [para. (g), R. 14].

The Commissioner of the Federal Mediation and Conciliation Service conferred with representatives of the Company and was informed that the Company's position was final and they would not conciliate the dispute [para. (g), R. 14-15]. The Commissioner informed the Union by letter dated May 23, 1955, that the defendant's position was firm and that the Union was "free to proceed with arbitration in this matter" (R. 15-16).

The Union did not within ten days after receiving the Commissioner's letter of May 23 request that the dispute be submitted to arbitration [para. (h), R. 16]. However, the Union did request arbitration by letter dated June 6, 1955, thirteen days after the receipt of the letter from the Commissioner [para. (i), R. 16]. No written reply was ever received to this letter (R. 16). Subsequent to the

foregoing correspondence the Union requested and the Company refused to submit the dispute to arbitration [para. (j), R. 17]. Thereafter, this action was commenced to compel arbitration under Section 301 (a) of the Act.

In dismissing the action, the Federal District Court held that the letter from the Company dated April 14, 1955, in which it refused to join in a request for conciliation of the dispute was its "final answer" within the contemplation of the contract (App. pp. 27-28; R. 29). Since no demand was made upon the Company for arbitration within ten days thereafter, the Union failed to comply with the procedural requirements of the grievance procedure. Therefore, the court said, "The Union lost its rights to enforcement of the arbitration promise by non-compliance" (App. p. 29; R. 31).

Furthermore, the District Court held that the procedural dispute as to whether the Company's letter of April 14, 1955, was its "final answer in writing" within the meaning of the contract, although "an arbitrable claim," was not arbitrable "at this time" because the "claim as to procedural compliance has not been discussed between the parties prior to the commencement of this action, nor has it been made the subject of the grievance procedure" (App. p. 26; R. 28).

The Court of Appeals affirmed the District Court, holding that where "a collective bargaining agreement gives no indication of who is to determine the issue of procedural arbitrability, it is, in the first instance, for the court to make this decision in a suit brought to compel arbitration" (App. p. 20). The Appellate Court also affirmed the District Court on the merits on the ground that no demand for arbitration was made by the Union within ten days after receipt of either the Company's letter of April 5, 1955, or the letter from the Federal Mediation and Conciliation Service of May 23, 1955 (App. p. 20).

REASON FOR GRANTING THE WRIT.

Two Cases Now Pending in This Court Involve an Issue Similar to the Issue Presented in This Petition.

This case raises the issue concerning the role which the federal courts should play in the pre-arbitration process under Section 301 of the National Labor Relations Act. Specifically, it involves a decision of the Seventh Circuit Court of Appeals which decided the *merits* of a procedural defense arising out of language in the collective bargaining agreement, raised as a defense to submitting the merits of the grievance to arbitration.

This court has granted certiorari in two similar cases now pending: *United Steel Workers of America v. American Manufacturing Company*, Case No. 360, and *United Steel Workers of America v. Warrior and Gulf Navigation Company*, Case No. 443. In both of these cases the appellate courts decided that the merits of the grievance involved were "baseless" or "insubstantial" and, therefore, there was no obligation on the part of the employers to submit such grievances to arbitration.[2]

The case at bar also presents the issue of "arbitrability," except that the *merits* of the grievance were conceded by both parties to be "arbitrable," and the alleged non-arbitrability is based upon an alleged (but denied) non-compliance by the union with the steps of the grievance *procedure*. Instead of referring the issue to the arbitrator for decision, the trial and appellate courts decided the "merits" of the procedural issue.

While many federal courts have considered the arbitrability of *substantive* contract issues, relatively few cases

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[2] *USW v. American Mfg. Co.*, 264 F. 2d 624; *USW v. Warrior and Gulf Navigation Co.*, 269 F. 2d 633

have been litigated involving the arbitrability of *procedural* issues.

The First Circuit, in *Boston Mutual Life Insurance Company v. Insurance Agents Int'l Union*, 258 F. 2d 516, held that whether the party demanding arbitration complied with all of the procedural requirements under a collective bargaining agreement was an issue to be decided by the courts, not the arbitrator.

However, a contrary view was taken by the U. S. District Court for the Eastern District of Pennsylvania in *Insurance Agents v. Prudential Insurance Company*, 122 F. Supp. 869, based upon state court precedent.[3]

One state court has *expressly* disagreed with the First Circuit opinion in the *Boston Mutual Life* case *Southwestern New Hampshire Transportation Co. v. Durham* (N. H. 1959), 152 A. 2d 596, 602.

Arbitrators are frequently called upon to decide issues relating to procedural compliance with the time limit provisions of the grievance procedure, and the alleged right of one party to "default judgment." However, in the absence of a specific provision calling for default judgment against the party who failed to comply with all the technicalities of the procedural requirements of the agreement, or a showing of prejudice resulting from the non-compliance, default judgment is generally not granted. *Rockwell Manufacturing Co.*, 25 Labor Arbitration Reports 534; ~~*Harriet Cotton Mills*, 26 Labor Arbitration Reports 399~~; *Cameron Iron Works, Inc.*, 25 Labor Arbitration Reports 295.

The decision below conflicts with the position taken by a leading writer in the field. See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1511.

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[3] This conforms to the expression of policy by this court in *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 457

The decision below that the union actually received a "final answer in writing" from the employer on the grievance is, of course, an "interpretation and application" of the terms of the agreement. This decision should have been made by the arbitrator, not the courts.

The issue presented in this petition remained undecided by this court in *Textile Workers v. Lincoln Mills*, 353 U. S. 448. The importance of the issue, and the need for a final authoritative decision, however, is demonstrated by the differences of opinion which exist among the federal courts, and between the federal and state courts. If combined with the cases in which certiorari has already been granted (*United Steel Workers of America v. American Mfg. Co.*, Case No. 360, and *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, Case No. 443), a decision in this case would give authoritative direction to the role which the federal courts will play in the arbitration process.

This court has held that the federal judiciary is to fashion the substantive law developed under Section 301 (a) "from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456. The National Labor Relations Act declares a federal policy designed to encourage peaceful solutions to labor disputes (29 U. S. C., Sec. 151).

The decision below does not encourage a peaceful method for settling disputes, because it makes a potential federal court case out of each grievance. It encourages reliance by the parties upon technical procedural positions more characteristic of the ancient and discredited techniques of common law pleading than of modern practices in collective bargaining.

For this reason the case at bar presents a more important issue to be resolved by this court than either the *American*

Manufacturing or the *Warrior & Gulf Navigation Co.* cases, supra, because here the merits of the dispute were actually conceded to be arbitrable. Here, only a court construction of a disputed application of the grievance procedure prevented the arbitration process from resolving the entire dispute.

Because the basic issue of "arbitrability" raised in this case is the same basic issue raised in the cases now pending in this Court, this Petition should be granted and the Writ of Certiorari issued.

Respectfully submitted,

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APPENDIX "A".

In the
United States Court of Appeals,
For the Seventh Circuit.

September Term and Session, 1959.

No. 12683.

Brass and Copper Workers Federal Labor Union No. 19322, AFL-CIO,
Plaintiff-Appellant,
v.
American Brass Company, Kenosha Division, a Subsidiary of Anaconda Copper Company,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

December 22, 1959.

Before HASTINGS, Chief Judge, and SCHNACKENBERG and KNOCH, Circuit Judges.

HASTINGS, Chief Judge. This is an action for specific performance under § 301 of the National Labor Relations Act, 29 U. S. C. A. 185, to compel arbitration under the relevant section of a collective bargaining agreement between the parties. The district court sustained defendant's motion to dismiss plaintiff's complaint on the merits, and this appeal followed.

Appellant Brass and Copper Workers Federal Labor Union No. 19322, AFL-CIO (Union) and appellee American Brass Company, Kenosha Division, a Subsidiary of Anaconda Copper Company (Company) entered into an Amended Pension Plan Agreement and a Collective Bargaining Agreement (Agreement). The latter Agreement provided for arbitration under two separate sections. Article VII of the Agreement, entitled "Grievance Procedure," provided for a series of "steps" to be followed in the procedure of adjusting "any complaint, controversy or grievance" involving the "terms" of the Agreement. After conferences between the Company and Union at successively higher levels, provision was made for a joint or unilateral request for the intervention of the Federal Mediation and Conciliation Service (Mediation Service). Article VII expressly retained for both parties the right of arbitration in the case of discharges for cause or disciplinary layoffs, but such requests were required to be made "in writing *within ten (10) days after the Company's final answer in writing to the Union.*" (Emphasis added.)

Article VIII of the Agreement, entitled "Arbitration," provided for arbitration of "any dispute" involving "the interpretation or application of any part of this Agreement which cannot be settled between the parties." This article also specified a time limit for submission to arbitration of "ten (10) days following the date when it is determined that the parties cannot agree." The Article further required that the issues for decision be set forth in writing and that arbitrators confine their decision to such issues.

Thus both articles provided that arbitration must be requested within ten days as above set out. The contract did not, as such, indicate whether a court or an arbitrator should determine that the parties had complied with this requirement.

Both the Pension Plan and the Collective Bargaining Agreement were in effect on April 1, 1955, when the Company compulsorily retired all employees who were then 69 years of age or older. Such employees were not eligible for pensions under the Pension Plan[1] because of insufficient service with the Company.

On April 4, 1955, the Union orally and in writing[2] protested the compulsory retirement of the non-pensioners, complaining that such retirements constituted discharges without "cause," contrary to the provisions of the collective bargaining agreement, and requested reinstatement and reimbursement for any loss suffered by reason of the compulsory retirement. The Company refused to reinstate the employees; it never gave a written answer to the Union's letter of April 4th.

On April 12, 1955, the Union wrote the Company as follows:

> "In accordance with Article VII Section 4 lines 199 to 202 we request that the Company join with us in submitting the question of illegal discharge of employees mentioned in our communication to you under date of April 4, 1955, to the U. S. Department of Conciliation for disposal.
>
> "Please advise at your convenience."

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[1] The Pension Plan Agreement provided for the termination of the eligible employee's services following his sixty-eighth birthday, unless written permission was given to continue service beyond that date. On January 1, 1955, Company had retired all workers eligible under the Pension Plan.

[2] "In accordance with the Agreement now in effect between the American Brass Company and Local No. 19322, F. L. U. A. F. L., the Union protests the illegal discharge of certain employees listed in your communication to the Union under date of February 14, 1955, because of age. We further request reinstatement of said employees with all rights restored and retroactive pay for time lost because of such illegal discharge." (Relevant section of Union's letter.)

The Company's reply of April 14, 1955 was as follows:

> "We acknowledge receipt of your communication of April 12, 1955 wherein you request that the Company join you in seeking the services of the U. S. Department of Conciliation.
>
> "The Company does not consider that the retirement of certain employees referred to in your letter of April 4, 1955 to be illegal discharges and consequently cannot join you in your request."

After the Company's refusal to join in a mutual request to submit the grievance to the Mediation Service, the Union did not immediately request arbitration, but made a unilateral request for the Mediation Service to intervene.

On May 23, 1955, Virgil H. Burtz, a Commissioner of the Mediation Service, after having conferred with the Company, informed the Union that "very little, if anything, could be gained by a joint conference with one of our Commissioners present, as both parties' positions are firm" and that the parties were "free to proceed with arbitration in this matter."

On June 6, 1955, thirteen days after receipt of Burtz's letter, the Union requested arbitration of the discharges in the following letter:

> "In accordance with Section 4 of Article VII the Union has contacted the Federal Mediation & Conciliation Service requesting that they mediate the dispute between the American Brass Company and Local No. 19322 regarding the discharge of employees 68 years of age and over. We have been advised that they are unable to mediate said dispute at this time. We are requesting that in accordance with the terms of our agreement that this question be submitted to arbitration. Please advise."

No written reply was ever received to this letter. On August 7, 1957, the Union instituted this action to compel arbitration of the dispute.

In the action below, the parties conceded the substantive arbitrability of the discharge (*i.e.*, that the dispute is the type that the parties had agreed to arbitrate), but the Company contended that the merits of the case could not be reached because the Union had not followed the *procedural* requirements of the collective bargaining agreement. Specifically, the Company contended that the Union had not (as required by the Agreement) filed its request to arbitrate within ten days after the receipt of the Company's "final answer" of April 14, 1955. The Union argued that its filing was timely, or at least, that there was no prejudice even though the request for arbitration was filed delinquently. This conflict obviously required an interpretation of the contract.

But there was further conflict between the parties regarding *who* should resolve this problem. The Company stated that it was the responsibility of the court, in a suit for specific performance, to determine whether the Company had *broken its promise* to arbitrate. This determination must include not only the issue of whether the Company had agreed to arbitrate the subject matter (substantive arbitrability) but also whether the Union had complied with the agreed procedure to bring the grievance to arbitration (procedural arbitrability). The Union, however, contended that the latter matter should be determined by the arbitrator himself prior to his consideration of the merits.

The district court held that under the contract in question, the issue of procedural compliance necessary to bring the matter before the arbitrator was itself arbitrable under Article VIII as an "interpretation * * * of any term of the agreement," but that since the dispute was not negotiated below and *formally* made a part of the grievance

procedure, it was not an arbitrable dispute properly subject to a decree for specific performance.

Since the dispute over procedural arbitrability had not been formally processed through the grievance procedure, the trial court could find no inference from the Agreement that the parties intended this issue to be submitted to the arbitrator. Relying on the case of *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. Un.*, 1 Cir., 258 F. 2d 516 (1958), the court determined the issue was one for it to decide. Proceeding with such determination and analysis of the Agreement, it held that under the procedure of Article VII, the Union must consider the Company's letter of April 14, 1955 as a "final answer." But even assuming the Union was proceeding under Article VIII (although its letter of June 6 mentioned only Article VII), Burtz's letter of May 23 was held to be a "final answer," and the request for arbitration was not made until thirteen days later. Since this was in excess of the time limit stated in "unambiguous language" in the Agreement, the court refused to grant specific performance, holding that the Union "has lost its rights to enforcement of the arbitration promise by non-compliance."

This appeal is based on dual grounds, first, that the issue of compliance with the Agreement is for the arbitrator to decide, and second, if for the court, that the court below erred in its determination of the issues under the Agreement.

The question of procedural arbitrability is therefore drawn in sharp terms. The necessity for determining this issue flows, essentially, from the case of *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957), in which the Court held that promises to arbitrate were specifically enforceable under § 301 of the Taft-Hartley Act and that federal rules of decision controlled cases under this section. Since there was no extensive residuum of federal law except the express provisions of the Taft-Hartley Act on this subject,

the Court charged the judiciary to fashion a federal common law on a case-by-case basis. In exercising this traditional judicial function, courts were to be guided by the purposes of national labor legislation and could absorb state rules of decision as federal law when such were consistent with the goals of national labor policy.

Subsequent to the holding that § 301 provides a forum for a party to bring an action to compel arbitration under a collective bargaining agreement, federal courts have been faced with the problem of determining when it is proper to order arbitration. The initial problem involved substantive arbitrability, which in turn, required a delineation of the power and responsibility of judges and arbitrators. It is obvious that an arbitrator's range of decision is necessarily restricted by a court's prior determination whether the parties had agreed to arbitrate the subject matter of the dispute.

In each case it is a collective bargaining agreement that the court must interpret. In certain instances the parties expressly indicate that arbitrability is for the courts. See *Local 201, Etc. v. General Electric Company*, 1 Cir., 262 F. 2d 265 (1959). Many times parties voluntarily submit arbitrability to the arbitrators.[3] The difficult case arises, as here, when the agreement does not expressly indicate who should decide this issue.

It is now well-settled that issues of substantive arbitrability are for the courts to determine. The keystone decision was *Local No. 149, Etc. v. General Electric Company*, 1 Cir., 250 F. 2d 922 (1957), cert. denied 356 U. S.

[3] A survey conducted by the American Arbitration Association of 1,728 grievances in 1954 shows that the issue of arbitrability was raised in a total of 133 cases, or 7.7%. In 41 of these cases, arbitrability was the sole issue. Only three of 1,183 cases studied involved court action to compel specific performance of the promise to arbitrate. American Arbitration Association, Procedural and Substantive Aspects of Labor Management Relations

938 (1958). Chief Judge Magruder there concluded that when one of the parties to a collective bargaining agreement appears before a court requesting a decree ordering specific performance of a contract to arbitrate, the court "has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise." *Id.* at 927.[4]

In this decision Chief Judge Magruder examined the contention of those commentators who urge that the issue of substantive arbitrability be left, in the first instance, for the arbitrator.[5] But he concludes that these arguments

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[4] In addition, see *New Bedford Defense Prod. Div. v. Local No. 1113, Etc.*, 1 Cir., 258 F. 2d 222 (1958) (rejecting the "Cutler Hammer doctrine"); *Engineers Ass'n. v. Sperry Gyroscope Co., Etc.*, 2 Cir., 251 F. 2d 133 (1957); *Lodge No. 12, Etc. v. Cameron Iron Works*, 5 Cir., 257 F. 2d 467 (1958); *Refinery Employees Union v. Continental Oil Co.*, 5 Cir., 268 F. 2d 447 (1959); *International Union, Etc. v. Benton Harbor Mal. Ind.*, 6 Cir., 242 F. 2d 530 (1957) (pre-*Lincoln Mills*); *American Laza. Corp. v. Local Union No. 222, Etc.*, 6 Cir., 250 F. 2d 137 (1958); *United Steelworkers of America v. American Mfg. Co.*, 6 Cir., 264 F. 2d 624, 628 (1959) (holding that a "frivolous, patently baseless" grievance, although substantively arbitrable, was not arbitrable under the agreement between the parties); *Machinist Local [illegible] Etc. v. U. S. Potash Co.*, 10 Cir., 270 F. 2d 496 (1959).

[5] "We are aware of a viewpoint urged in responsible quarters that the interests of effective labor arbitration would best be served by committing to the arbitrator in the first instance the question of arbitrability, that is, the question whether there is any issue to be arbitrated under the collective bargaining agreement. It is said that a collective bargaining contract is a very special type of document, in respect of interpretation, as to which an arbitrator has certain advantages over a court; that a collective bargaining agreement, though embracing a multitude of terms covering numerous employees working at various tasks, cannot be expected to have pinpointed each of many problems to be dealt with in relations between the management and the union; that the contract instead contains unexpressed assumptions that many procedures and practices will continue; that under the more simplified and speed procedures of an arbitration, more evidence with regard to these unexpressed assumptions may be available, and an arbitrator may have the additional advantage of background knowledge derived

are not controlling in the case where a party comes to the court for specific performance,[6] but are important and persuasive for the parties at the bargaining table in writing a contract which grants arbitrators wide scope in their decisions and even in expressly reserving such a determination for the arbitrator.[7]

In the sole post-*Lincoln Mills* case under § 301 which has involved procedural arbitrability, *Boston Mutual Life Insurance Co. v. Insurance Agents' Int. Un.*, 1 Cir., 258

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from past experiences with the parties. Therefore it may be desirable in the first instance to have an arbitrator pass on the threshold question of arbitrability, instead of running the possible risk that a court, in the guise of ruling on this preliminary question of the jurisdiction of the arbitrator, may in effect make a ruling upon the merits of the asserted grievance. See Summers, 'Judicial Review of Labor Arbitration or Alice Through the Looking Glass,' 2 Buffalo L. Rev. 1 (1952); Cox, 'Some Lawyers' Problems in Grievance Arbitration,' 40 Minn. L. Rev. 41 (1955); Clifton, 'Arbitration and Arbitrability,' 3d Annual Conference on Labor, N. Y. U. 187 (1950). See also *Greyhound Corp. v. Division 738 of Amalgamated Association of Street, etc., Employees of America*, 1954, 44 Wash. 2d 808, 271 P. 2d 689. See also an address by Professor Cox at the University of Cincinnati Conference on Labor Arbitration, November 14, 1957, entitled 'Current Problems in the Law of Grievance Arbitration.'" 250 F. 2d at 826.

[6] A state case heavily relied upon by appellant here, *Southeastern New Hampshire Transp. Co. v. Durham*, ... N. H. ..., 152 A. 2d 596 (1959), holds that procedural arbitrability is for the arbitrator to decide. This case, however, was an *appeal* from the prior ruling of arbitrators. It does not meet the core of the problem in an action to *compel* arbitration, in which the court has to determine how extensively it would examine whether the reluctant party had breached its promise to arbitrate.

[7] *Local No. 149* was based both on an independent analysis of the court's responsibility under § 301 and on the practice under the United States Arbitration Act. In a prior decision to *Lincoln Mills, Local 205, Etc. v. General Electric Company*, 1 Cir., 233 F. 2d 85, 101 (1956), the court had determined a similar case under the Arbitration Act. On certiorari, in an opinion accompanying *Lincoln Mills, General Electric Co. v. Local 205*, 353 U. S. 547 (1957), the Court affirmed the judgment, but stated that it followed "a different path * * * [to] the same result." 353 U. S. at 548.

F. 2d 516 (1958), Chief Judge Magruder held that the court was unwilling to "whittle away" the holding in *Local No. 149* and determined that under the rationale of that case, procedural arbitrability is in the first instance a matter for the courts to determine.[8]

In *Boston Mutual*, the employer requested a declaratory judgment that the union's grievance claim with respect to the discharge of an employee had not been submitted for arbitration within a reasonable time and was therefore not subject to arbitration. In his holding, Chief Judge Magruder again referred to the large body of opinion which argues that arbitrators should be given wide sway, but concludes this is relevant to the bargaining table, not to a decree for enforcement. He stated, however, that "practical considerations as to what would best promote effective labor arbitrations," *id.* at 517, might be an element in construing the scope of ambiguous language as to the matters sent to arbitration. However, the court concluded that the "inescapable obligation" of determining the issue of seasonable submission to arbitration was for the court,[9] and remanded for that consideration.[10]

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[8] In a pre-*Lincoln Mills* case, decided under Pennsylvania law, the district court sent to the arbitrator the question of whether an alleged two-day violation of agreed procedure precluded bringing the action. The court stated, "Arbitration is here to stay, and particularly where the parties have elected to submit their differences to it, the courts should not try by hair-splitting decisions [to] hamstring its operation." *Insurance Agents' Inter. Union v. Prudential Ins. Co.*, D. C. E. D. Pa., 122 F. Supp. 869, 872 (1954).

[9] Commentators have been critical of the result in *Boston Mutual*. See Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 638 (1959); Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1511 (1959).

[10] On remand, the district court held that the application for arbitration was made with due diligence, depending to a great degree on the fact that there was no substantial prejudice occasioned by the delay. *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. U.*, D. C. Mass., 171 F. Supp. 125 (1959).

We approve the rationale of the decision in *Boston Mutual*. In the case where a collective bargaining agreement gives no indication of the intended party to determine the issue of procedural arbitrability, it is, in the first instance, for the court to make this decision in a suit brought to compel arbitration. Accordingly, we hold that the district court was correct in considering this issue.

Further, having found that the district court properly considered the issue of procedural arbitrability, we find no error in its disposition of this case. Even considering the events most favorable to appellants (that the letter of May 23 was the "final answer"), appellant's request for arbitration came too late under the terms of the Agreement, since it was made thirteen days after receipt of the final answer.

The judgment of the district court dismissing plaintiff's complaint on the merits is

AFFIRMED.

A true copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B".

28 UNITED STATES DISTRICT COURT.

(Caption—57-C-185)

OPINION.

Action under Section 301 of the National Labor Relations Act, 29 U. S. C. A. 185 (1947), for specific performance of an arbitration provision of a collective bargaining agreement.

Plaintiff, Brass and Copper Workers Federal Labor Union No. 19322, AFL-CIO (hereinafter referred to as the "Union"), and defendant, American Brass Company, Kenosha Division, a subsidiary of Anaconda Copper Company (hereinafter referred to as the "Company"), executed an Amended Pension Plan Agreement and a Collective Bargaining Agreement, both of which were in effect on April 1, 1955, when the Company compulsorily retired all employees who were then 69 years of age or older even though these employees were not eligible for pension under said Agreements.

On April 4, 1955, the Union protested these retirements orally in a grievance meeting with the Company's representatives and also wrote a letter to the Company protesting the "illegal discharge of certain employees"
29 because of age and requesting their reinstatement. The Company did not answer the Union's letter of April 4, 1955.

On April 12, 1955, the Union wrote to the Company as follows:

> "In accordance with Article VII Section 4 lines 199 to 202 we request that the Company join with us in submitting the question of illegal discharge of em-

ployees mentioned in our communication to you under date of April 4, 1955, to the U. S. Department of Conciliation for disposal.

"Please advise at your convenience."

Section 4 referred to in the above letter appears to be subsection 4 of Section 1 of Article VII of the Agreement.

The Company replied by letter on April 14, 1955, as follows:

"We acknowledge receipt of your communication of April 12, 1955 wherein you request that the Company join you in seeking the services of the U. S. Department of Conciliation.

"The Company does not consider that the retirement of certain employees referred to in your letter of April 4, 1955 to be illegal discharges and consequently cannot join you in your request."

The Union thereupon, unilaterally, requested the Federal Mediation and Conciliation Service to intervene. After conferences with the Company, Virgil H. Burtz, the Commissioner, informed the Union by letter of May 23, 1955, that "• • • very little, if anything, could be gained by a joint conference with one of our Commissioners present, as both parties' positions are firm."

On June 6, 1955, the Union by letter to the Company requested that the dispute be submitted to arbitration.

The Complaint in this action was filed on August 7, 1957.

The above facts have been submitted by stipulation. The parties also agree that the Union did not request arbitration in writing within ten days of the Company's letter of April 14, 1955, or within ten days of Commissioner Burtz's letter of May 23, 1955.

The Union, as well as the Company, apparently has proceeded on the theory that the Union was seeking arbitration of the discharges under Article VII, Section 3, of the Agreement. It is the position of the Union that the letter of the Company of April 14, 1955, is not a final answer as contemplated by said Section 3. Never having received a final answer, the Union's request for arbitration was, therefore, timely. It contends that any issue as to compliance with the procedural requirements of the arbitration provisions of the Agreement is to be referred to the arbitrator for determination. Should the court determine this issue and find that the request was not made timely, it contends that the Union's rights are not thereby waived since the Company was not prejudiced thereby.

The Company concedes the substantive arbitrability of the discharge dispute. It contends that the issue of the procedural arbitrability of the claim is for the court and that the failure of the Union to comply with the procedural requirements of the arbitration provision of the Agreement constitutes a waiver of the Union's right to enforce the Company's promise to arbitrate.

The questions presented by the controversy are the following:

1. Whether, in an action for specific performance of an agreement to arbitrate, an issue as to procedural arbitrability of a substantively arbitrable dispute is for determination of the District Court, or whether such issue shall be referred to the arbitrator; and

2. Whether noncompliance with the procedural requirements of the Agreement constitutes a waiver of the Union's right to arbitration.

The substantive law to be applied in actions arising under Section 301 of the National Labor Relations Act is

federal law which the court must fashion from the policy of national labor laws. *Textile Workers v. Lincoln Mills*, 353 U. S. 448 at 457 (1957).

Generally it has been held that the question of arbitrability of the subject matter, or substantive arbitrability, is for the District Court in the first instance. *Local No. 149, etc. v. General Electric Co.*, 250 F. 2d 922 (1st Cir., 1957), cert. den. 356 U. S. 938; *International Union, etc. v. Benton Harbor Mal. Ind.*, 242 F. 2d 536 (6th Cir., 1957), cert. den. 355 U. S. 814. Substantive arbitrability is to be determined from the scope of the agreement.

The law governing the determination of procedural questions of arbitrability, such as timeliness of request, inaction or failure to comply with conditions precedent to promises to arbitrate, is not settled.

One view holds that where the substantive claim is arbitrable, the question of procedural compliance is also for the arbitrator as part of the question of the claim. The reason for this rule is stated in *Insurance Agents' Inter. Union v. Prudential Ins. Co.*, 122 F. Supp. 869, 872 (E. D. Pa., 1954) (decided under Pennsylvania law) as follows:

32 "Arbitration is here to stay, and particularly where the parties have elected to submit their differences to it, the courts should not by hair splitting decisions hamstring its operation."

The Court of Appeals for the First Circuit has examined this question in recent cases, decided after *Textile Workers v. Lincoln Mills, supra*, approved enforcement of executory agreements to arbitrate by the remedy of specific performance under Section 301 of the National Labor Relations Act and determined that federal law governed such actions. That court has held that the District Court must determine initially that the party

against whom relief is requested is in violation of a promise to arbitrate the particular issue. *Local 201, etc. v. General Electric Co.*, 262 F. 2d 265 (1st Cir., 1959). The District Court must determine, as a matter of law, whether all conditions precedent to arbitration have been fulfilled. *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. Un.*, 258 F. 2d 516 (1st Cir., 1958). In that case the District Court had ordered the parties to proceed to arbitration, leaving the question of whether or not the Union had pressed for arbitration within a reasonable time for the arbitrator. The Court of Appeals reversed the judgment and remanded the matter to the District Court. It held that the particular contract did not provide for arbitration of the procedural question since this did not constitute a "grievance". Only "grievances" as to disputes regarding the interpretation and application of terms of the agreement were held arbitrable.[1]

The same court further explained its rule on procedural arbitrability in *Local 201, etc. v. General Electric Co., supra.* Whether this is a question for the court, or whether it is for the arbitrator in case of a substantively arbitrable claim is to be determined by inferences drawn from the provisions of the contract as to the parties' intentions.

The parties agree that the substantive claim is arbitrable and that the Union is proceeding under Section 3, Article VII, of the Agreement, specifically dealing with review in arbitration of Company action in making discharges for cause or disciplinary layoffs.[2] In this section, review in arbitration is conditioned on the request being made in writing within ten days after the Company's final answer in writing to the Union.

Article VIII of the Agreement is the arbitration provision. Section 1 thereof provides that any dispute arising between the Company and the Union as to interpre-

tation or application of any part of the Agreement "which cannot be settled between the parties" may be submitted to arbitration after certain steps of the grievance procedure have been complied with.

Section 3 of Article VIII provides that the Arbitration Board shall have no power to add to, subtract from, or modify any of the terms of the Agreement; excludes certain subjects from arbitration; and states that only one issue is to be arbitrated at a time unless there is mutual consent to do otherwise.

Unlike the agreement in *Local 201, etc. v. General Electric Co.*, 262 F. 2d 265 (1st Cir., 1959), the collective bargaining agreement between the parties here contains no provision governing who is to determine the question of arbitrability. A claim respecting the timeliness of the request for review in arbitration of a dispute as to
34 the meaning of "final answer" goes to the "interpretation and application of any term of the agreement" and would, therefore, by nature be an arbitrable claim. However, Article VIII of the Agreement, the arbitration provision, suggests by its terms that any dispute, in order to be considered an arbitrable dispute, is one that has been the subject of attempted negotiation and settlement between the parties. In this sense, the claim as to procedural compliance has not been discussed between the parties prior to the commencement of this action, nor has it been made the subject of the grievance procedure. Such a claim, raised as a defense in this action, is not an arbitrable dispute at this time.

Procedural compliance is a separate issue, distinct from the question of the legality of the discharges. While the Company may raise the question of waiver of rights as a defense, this does not go to the merits of the discharge issue. The Company has not consented to submitting this additional issue to the arbitrator.

In the absence of a controlling provision in the Agreement, the terms thereof do not give rise to an inference that it was the intention of the parties to submit the issue of procedural arbitrability to the arbitrator as part of another, otherwise arbitrable, claim. Following the view of *Local 201, etc. v. General Electric Co., supra*, and *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. Un.*, 258 F. 2d 516 (1st Cir., 1958), the issue of procedural arbitrability here is for the court.

While the parties assumed that the Union was proceeding under Article VII, Section 3 of the Agreement, it appears, nevertheless, that the Union had resort to certain portions of the general arbitration provision, Article VIII. One difference between these provisions appears to lie in the fact that under Section 3 of Article VII, resort to the U. S. Conciliation Department is not called for, while under Article VIII, this is an optional step.

The term "final answer", relevant to setting the time running for requesting arbitration under Section 3, Article VII, must be interpreted in light of the preceding sections and the actual happenings between the parties. Prior to arbitration, the discharged employee has the right to appeal to the Company through the Union Bargaining Committee for a review of his case. Apparently something in the nature of such a review has been had in this case in the "grievance meeting" which took place on April 4, 1955. At this time the Company made clear its position that it did not consider the discharges illegal. When the Union subsequently requested the Company to join it in conciliation proceedings (unnecessarily so, if proceeding under Article VII, Section 3), the Company reiterated its position in writing. Its refusal to join the Union in a final attempt at settlement does not permit a suggestion of a possibility of further negotiation or at-

tempted settlement. After the Company stated its position in the letter of April 14, 1955, nothing further remained to be done except a request for arbitration under Section 3 of Article VII. Under these circumstances, this letter of the Company may be considered its "final answer" on this question.

By way of comparison, the construction placed on a letter by the Supreme Court of Wisconsin in *Aluminum Goods Mfg. Co. v. Wisconsin E. R. Board*, 271 Wis. 597, 74 N. W. (2d) 154 (1956), may be noted. There a letter which left open the door to further negotiation was held not to be a "final decision relative to said grievance."

36. Assuming that the Union believed it was proceeding to arbitration under Article VIII, its attempted compliance with step four of the Grievance Procedure, i. e., conciliation, was optional under the Agreement. In view of the Company letter, this step might reasonably have been deemed futile and one which the Union would not have been required to pursue. The letter of Commissioner Burtz of May 23, 1955, affirmed that no agreement could be reached through conciliation. The Union did not request arbitration within ten days of receipt of the Commissioner's letter as required by Article VIII, Section 1. It appears, therefore, that regardless of whether the Union sought arbitration under Article VII, Section 3, or under Article VIII, it failed to comply with conditions to the promise of the Company to arbitrate as set forth in the Agreement.

The conditions, in unambiguous language, provide for a specific period of time in which requests for arbitration must be submitted. These terms do not appear unreasonable or harsh on their face.

The grant of specific performance rests in the sound judicial discretion of a court of equity and must be de-

termined by the peculiar circumstances of each case in light of general equitable principles. *Neary v. Markham*, 155 F. 2d 485 (10th Cir., 1946). It is neither equitable, nor does the court have the power to rewrite the contract entered into by the Union and the Company.

In the absence of the Union's compliance with the specific procedural requirements of the Agreement, the Company's refusal to arbitrate is not in violation of the Agreement, notwithstanding the absence of any forfeiture provisions coupled to the conditions precedent of the
37 arbitration promise. The Union has lost its rights to enforcement of the arbitration promise by non-compliance.

The court adopts the stipulation of facts as its findings of fact. The conclusions of law are as set forth in the opinion.

Counsel for the defendant is directed to prepare an order dismissing the action, submitting it to opposing counsel for approval as to form only.

Dated at Milwaukee, Wisconsin, this 5th day of May, 1959.

K. P. Grubb,
U. S. District Judge.

38 Footnotes.

1. On remand, the District Judge held that the delay was not unreasonable and not prejudicial to the Company, 36 Labor Cases, ¶ 65998, D. C. Mass., Civ. Action No. 58-266-W.

2. Article VII of the Agreement governs the Grievance Procedure. This provides as follows:

"Section 1. Should there be any complaint, controversy, or grievance involving the terms of this Contract by an employee or the Union or the Com-

pany, the same shall be handled in the following manner:

"1. Between the immediate foreman and the Union Steward in the division.

"2. Between the Department Foreman and the Department Committee. At this point, the grievance or controversy shall be reduced to writing on a blank allowing for notations as to action or disposition. Copies of such form properly filled out shall be given to both parties.

3. (This provides for further conferences and negotiation between the Union Bargaining Committee and the Management of the Company and bringing in additional representatives of the Company and of the American Federation of Labor.)

"4. In the event that the parties are then unable to agree, either party or both parties may call in the U. S. Department of Conciliation."

Section 2. (This provides for appeals by employees discharged or suspended for disciplinary reasons.)

"Section 3. The Company agrees that its action in making discharges for cause or giving disciplinary layoffs, may be reviewed in arbitration, at the request of either party, but such request shall be made in writing within ten (10) days after the Company's final answer in writing to the Union."

The remaining provisions of Article VII have no application in this action.

Article VIII, Arbitration, provides insofar as pertinent:

"Section 1. Should any dispute arise between the Company and the Union as to interpretation or application of any part of this Agreement which cannot be settled between the parties, then the matter may be submitted to arbitration. This must be done within

ten (10) days following the date when it is determined that the parties cannot agree at the Third Step in the grievance procedure. Except that if either party gives notice of taking the matter to the Fourth Step, then arbitration may be appealed to within ten (10) days after it is determined that no agreement can be reached by the Fourth Step."

39. The "steps" referred to in the Section are the corresponding subsections of Section 1, Article VII.

Section 2. (This deals with the constitution of the Arbitration Board.)

"Section 3. Matters to be arbitrated shall be limited to the settlement of specific claims arising out of the interpretation or application of the specific terms and provisions of this Agreement. The Arbitration Board shall have no power to add to, subtract from, or modify any of the terms of this Agreement. No question of a change in the wage scale or differentials shall be subject of arbitration. Before the submission of a grievance or dispute to arbitration, the Company and the Union shall set forth in writing specifically the issue to be submitted to arbitration, and the Arbitration Board shall confine its decision to such issue. It is understood and agreed that only one issue at a time may be arbitrated, unless the parties mutually agree to do otherwise."

40. UNITED STATES DISTRICT COURT.

(Caption—57-C-185)

ORDER.

This matter having come on for trial before the Court, the Honorable K. P. Grubb, District Judge presiding, on the 7th day of April, 1959 and the parties hereto having

entered into a stipulation of facts, which facts have been adopted by the Court as its findings of fact, and the parties having submitted briefs and oral argument and the Court being duly and sufficiently advised in the premises and having stated its conclusions of law in its opinion herein dated May 5, 1959,

Now, Therefore, on motion of F. H. Prosser, as attorney for the defendant American Brass Company, it is

Ordered, that the plaintiff's complaint herein be and the same is dismissed on the merits without costs.

Dated, at Milwaukee, Wisconsin, this 8 day of May, 1959

By the Court:

K. P. Grubb,

U. S. District Judge